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13 **UNITED STATES DISTRICT COURT**
14
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 ARIEL FREANER,) CASE NO.: 11CV1819 JLS MDD
17)
18 Plaintiff,) **MEMORANDUM OF POINTS AND**
19) **AUTHORITIES IN SUPPORT OF**
20 v.) **MOTION TO COMPEL ARBITRATION**
21)
22 ENRIQUE MARTIN LUTTEROTH)
23 VALLE, HOTELERA CORAL, S.A.)
24 de C.V., a stock company of)
25 Baja California, Republic)
26 of Mexico; and DOES 1 to 10)
27)
28 Defendants.)

1 **I.**

2 **STATEMENT OF FACTS**

3 On or about June 23, 2008, the parties entered into a
4 written contract entitled "Services Agreement" (hereinafter
5 "Agreement"). The binding arbitration agreement contained in the
6 Agreement states:

7 d. Arbitration. Any controversy or claim arising out of or
8 related to this Agreement, or breach thereof, shall be
9 submitted to and resolved by binding arbitration. The
10 arbitration will be conducted in San Diego, California by a
11 single neutral arbitrator and in accordance with the then
12 current rules of the American Arbitration Association. The
13 arbitrator shall have the power to enter any award that
14 could be entered by a judge of the trial court of the State
15 of California, and only such power, and shall follow the
16 law. The parties agree to abide by and perform any award
17 rendered by the arbitrator. The arbitrator shall issue the

1 award in writing and therein shall state the essential
2 findings and conclusions on which the award is based.
3 Judgment on the award may be entered in any court having
4 jurisdiction thereof.

5 (Attached to the Declaration of Frederick M. Reich filed
6 concurrently herewith is a true and correct copy of the
7 Agreement).

8 The Agreement also contained a provision specifying the
9 place of performance, choice of law, and consent to jurisdiction.
10 Paragraph 18.e. reads:

11 e. California Law to Govern. This Agreement is being
12 delivered and is intended to be performed in the State of
13 California and is to be construed and enforced in accordance
14 with the laws of California. Each party consents to the
15 jurisdiction and venue of the state or federal courts in San
16 Diego, California in any action, suit, or proceeding arising
17 out of or relating to this Agreement.

18 A dispute has arisen concerning whether Defendants breached
19 the Agreement, and if so, the nature and extent of Plaintiff's
20 damages.

21 On June 21, 2011, Plaintiff filed a Breach of Contract
22 Complaint in the Superior Court, County of San Diego, Case No.
23 37-2011-00093218.

24 The parties attempted to, but were unsuccessful in agreeing
25 on an arbitrator. Further, Defendant has attempted to place
26 conditions as to both the arbitrator and the applicable law which
27 are not contained in the Agreement.

28 On August 15, 2011, Defendant Lutteroth filed a Motion To
Compel Arbitration and then immediately removed this action to
Federal Court. Since Defendant's Motion To Compel Arbitration
was filed in State Court, this court does not have it on
calendar. Therefore, Plaintiff brings the present motion in this

1 Court.

2 II.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 **A. Parties Agree To Binding Arbitration But Defendant**
5 **Attempts To Add Conditions Not Contained in the Agreement**

6 The parties agree that this matter is to be resolved through
7 binding arbitration. However, the parties cannot agree upon an
8 arbitrator. Yet, curiously, Defendant Lutteroth refuses to
9 submit this matter to an arbitration service and employ a "strike
10 and rank" process for arbitrator selection.

11 **B. Defendant's Attempt To Gain Tactical Advantage**

12 Defendant attempts to place its unilateral conditions on
13 both the arbitrator selection and on the process itself surely in
14 order to gain some perceived tactical advantage.

15 **1. Bilingual Arbitrator?**

16 First, Defendant asserts that the arbitrator must be
17 bilingual. The Agreement does not provide for a bilingual
18 arbitrator. In fact, quite to the contrary, the Agreement makes
19 clear that any dispute is to be resolved in San Diego, California
20 in the English language. The choice-of-law provision in
21 Paragraph 18.e. requires that California law shall apply to any
22 dispute. Also, the parties agreed to jurisdiction and venue in
23 San Diego, California where, obviously, legal proceedings are
24 conducted in the English language.

25 Furthermore, Paragraph 17 provides in part:

26 In the unlikely event that a dispute arises, the English
27 version of all correspondence shall govern. Where there is
28 no English version, however, Clients shall be responsible
for any costs of translation that may be necessary in the

1 event that a dispute arises.

2 Nothing in the Agreement contemplates that the arbitration
3 would be conducted in Spanish, either whole or part, or that the
4 arbitrator must be bilingual. Plaintiff's counsel does not read,
5 write or speak Spanish. For any portion of the arbitration to be
6 conducted in Spanish would prejudice Plaintiff. Plaintiff
7 submits that this is the true reason for Defendant's insistence
8 on a bilingual arbitrator. Defendant's attempt to impose this
9 unilateral condition is not based on the Agreement or laws of
10 California.

11 **2. International Commercial Law?**

12 Second, Defendant argues that the arbitrator must be
13 familiar with international commercial law. Again, Defendant
14 attempts to fabricate terms and conditions out of thin air.
15 Nothing in the Agreement contains such a requirement. In fact,
16 the Agreement specifies that California law shall govern any
17 dispute, not international commercial law. Again, Paragraph
18 18.e. clearly states that "[t]his Agreement...is to be construed
19 and enforced in accordance with the laws of California."

20 The present matter is a straight forward breach of contract
21 case governed by state law. Nothing more, nothing less.

22 **III.**

23 **CONCLUSION**

24 While both parties agree that this dispute will be resolved
25 by binding arbitration, Defendant will only agree to arbitration
26 if he can add unilateral conditions to the process even though
27 those conditions directly contradict the Agreement itself. The
28 arbitration should take place in accordance with the terms of the

1 Agreement entered into between the parties.

2 Plaintiff respectfully requests that the parties be ordered
3 to submit this matter to binding arbitration through AAA, and
4 that they be ordered to employ the "strike and rank" arbitrator
5 selection process contained in AAA rules. Further, Plaintiff
6 respectfully requests that a finding be made that the law of
7 California apply to this dispute.

8
9 **LAW OFFICES OF JAMES J. WARNER**
10 Respectfully Submitted,

11 Dated: September 2, 2011

12 /s/ Frederick M. Reich
13 Frederick M. Reich
14 Attorney for Plaintiff
15 Ariel Frenan